IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1355

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM EARL MATLOCK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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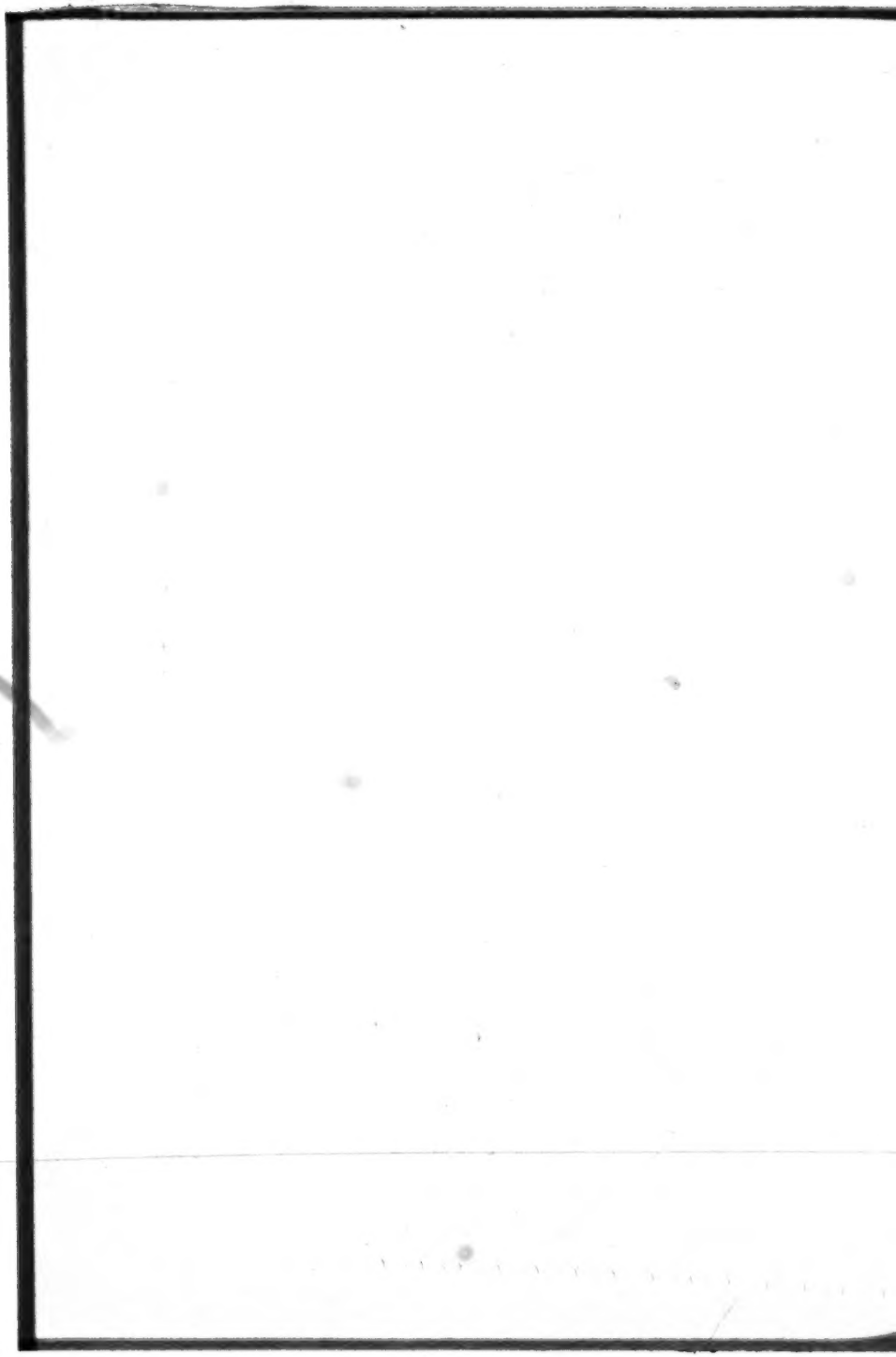

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STATEMENT OF FACTS

At approximately 9:30 a.m. on November 12, 1970, several local law enforcement officers went to the William E. Marshall home, in Pardeeville, Wisconsin, for the purpose of arresting William E. Matlock, the Respondent herein. They arrested him in the yard of the home, some substantial distance from the house. Matlock offered no resistance. He was placed in a squad car parked some distance from the house. The house was under complete seige.

The home was leased by Walter and Elaine Marshall, and on said date was occupied by Mr. and Mrs. Marshall, their thirteen year old daughter, Kathleen, their sixteen year old son, Steven, an adult daughter, Gayle Graff, and her three year old son, and by the Respondent herein. At no time were Gayle Graff and the Respondent married to one another.

Respondent occupied a room on the east side of the second floor. There was an agreement between Mr. and Mrs. Marshall and Respondent that he would pay $25.00 per week for his room and board. He was current in his payments, or nearly so, as of November 12, 1970. At no time did the Respondent consent to a search of any part of the Marshall home.

Immediately after the arrest of Respondent, three local law enforcement officers went to the door of the Marshall home. They were admitted by Gayle Graff. The officers told Gayle that they were looking for money and a gun and wished to search the house. At this time the officers did not know where in the house, if at all, the money or gun was located, nor did they know which part of the house, if any, had been occupied by Respondent. They asked Gayle Graff whether they could search the house. She consented.

At no time was a search warrant obtained by any law enforcement officer, either local police or FBI, although there was adequate time to obtain one or more warrants. There was no emergency nor any danger to any police officer or any other persons which required that a search proceed without a warrant. The search was not incidental to the arrest of Respondent.

None of the officers made any inquiry as to whether Respondent occupied the east bedroom as a guest or as a paying tenant, nor whether Respondent and Gayle Graff were married to one another, or whether they had been

living together regularly in the Marshall home, or elsewhere. Nothing was said to the officers on these subjects. The searching officers seized $4,995.00 and certain other items from a closet and dresser-drawer in Matlock's room.

The Respondent was indicted for bank robbery in the United States District Court for the Western District of Wisconsin. In the District Court, a motion was brought to suppress certain of the items seized during the warrantless police searches. The District Court, after extensive evidentiary hearings, suppressed the evidence seized during the first search, including the $4,995.00.

On appeal by the Government, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's Order relating to the suppression of those certain items of evidence.

SUMMARY OF ARGUMENT

I

The Courts below properly held that in order for a warrantless search to be valid and fall within the meaning and spirit of the Fourth Amendment, in a situation in which consent is given by a third party to police officers to search another's room, said consentor must not only have had apparent authority, but also must have had actual authority to give said consent.

This Court and other courts have properly, on previous occasions, used the two-prong test of "apparent" and "actual" authority in reaching decisions regarding warrantless searches consented to by third parties. This Court on a previous occasion specifically rejected the position which the Government now urges, namely, one-prong of the two-prong approach, i.e., "apparent authority," as the sole criteria for determining constitutionality.

II

The Courts below properly recognized that the Government had to establish facts pertaining to the actual authority of the consenter "to a reasonable certainty, by the greater weight of the credible evidence." The Government urges this Court to adopt a standard that is in fact very, if not totally similar to that used by the lower courts in reaching their decisions. The Government does not, and cannot show how its position was prejudiced by the standard of proof used in the lower courts.

III

The lower courts correctly ruled that certain out-of-court statements made by Respondent and Mrs. Graff were hearsay and did not fall within any exception to "the hearsay rule." The Government agrees that the statements are hearsay. However, it attempts to create a new category of hearsay called "reliable hearsay," without any authority to support its position. The lower courts' position was correct in holding that hearsay is not admissible as substantive evidence to prove the existence of a fact in issue.

ARGUMENT

I.

TO ESTABLISH THE LEGALITY OF THE SEARCH THE COURTS BELOW CORRECTLY HELD THE GOVERNMENT MUST SHOW NOT ONLY THAT IT REASONABLY APPEARED TO THE INVESTIGATING OFFICERS THAT MRS. GRAFF HAD AUTHORITY AS A JOINT OCCUPANT TO CONSENT TO THE SEARCH, AND THAT SHE DID IN FACT CONSENT TO IT, BUT ALSO, THAT MRS. GRAFF DID IN FACT HAVE THE ACTUAL AUTHORITY TO CONSENT TO A SEARCH OF THE RESPONDENT'S ROOM.

The Government argues that to require it to prove the actual authority of a person who reasonably appears to have authority to consent to a search, and does consent, "places a restriction on consent searches not required by the Fourth Amendment."

The Fourth Amendment to the Constitution of the United States reads:

"No warrant shall issue, but upon probable cause."

The presence of a search warrant serves a high function, and, absent a grave emergency, the Fourth Amendment is interposed as a Magistrate between a citizen and the police. This was done not to shield criminals or to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to intrust to the discretion of those whose job is the detection of crime and the arrest of criminals.

Here we have a case where the searching officers admitted they were in no danger. They further admitted they had no knowledge whatsoever whether there was

any evidence or proof of the alleged crime in the Marshall home. Matlock was in their custody. They did not ask him for *his* permission to search the Marshall residence or, in particular, his room. No inquiry was made as to whether Respondent, in fact, resided in the Marshall residence, and if he did, what his living arrangements were. One can only assume that inquiry was not made because the officers felt that Respondent would deny them permission to search his room.

The Government would have this Court accept a rule which would permit a person who appears to have apparent authority to consent to a search and to waive the constitutional rights of another, even if the consenting person is utterly without actual authority to act on the other person's behalf, or, even if he is a total impostor.

The "apparent authority" rule advocated by the Government in this case was expressly rejected in *Stoner v. California*, 376 U.S. 483, 487 (1964).

> "Accordingly, the respondent has made no argument that the search can be justified as an incident to the petitioner's arrest. Instead, the argument is made that the search of the hotel room, although conducted without the petitioner's consent, was lawful because it was conducted with the consent of the hotel clerk. We find this argument unpersuasive.
>
> "Even if it be assumed that a state law which gave a hotel proprietor blanket authority to authorize the police to search the rooms of the hotel's guests could survive constitutional challenge, there is no intimation in the California cases cited by the respondent that California has any such law. Nor is there any substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority

to consent to the search. Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' As this Court has said, 'It is unnecessary and ill-advised to import into the laws surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . . (W)e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." *Jones v. United States,* 362 U.S. 257, 266-267, 4 L.Ed.2d 697, 705, 706, 80 S.Ct. 725, 78 ALR 2d 233.

"It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's."

In *Chapman v. United States,* 365 U.S. 610 (1961), a search by police officers of a house occupied by a tenant invaded the tenant's constitutional rights even though the search was authorized by the owner of the house. The owner presumably had not only apparent authority, but also actual authority to enter the house for certain purposes. The officers' purpose in entering, however, was not for those purposes reserved to the owner. We call *Chapman* to the Court's attention because it is a case in which this Court considered not only "reasonable appearance" but also "actual authority," and the scope of that authority, to determine whether a voluntary consentor's consent to search was binding upon the defendant in that case. While it is true that in *Chapman,* this Court did not

directly consider the question which the Government raised in the instant case, the Court did, in effect, use the *apparent authority* and *actual authority* test upholding the lower court in reaching its decision in *Chapman*.

While it is clear that one of the joint occupants of a residence may consent to a search of premises jointly occupied, and by his consent bind the non-consenting occupant to the evidence seized therefrom, courts in cases involving this type of situation have considered the "actual authority" of the consentor in reaching their decision. *Roberts v. United States*, 332 F.2d 892, 896, 897 (CA 8th Cir. 1965), cert. denied, 380 U.S. 980 (1965), held that where a young woman, not the defendant's wife, was living with the defendant, a married man, and voluntarily consented to a police search of the premises without a warrant, said search was constitutionally proper:

> "The defendant's argument that Miss Hilan's consent could not affect his right to be free from unreasonable searches must also be rejected. In *United States v. Sferas*, supra, 210 F.2d at 74, we acknowledge the rule that 'where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either.' The rule has been applied by other courts to searches following consent given by the wife of the defendant, e.g. *Roberts v. United States*, 332 F.2d 892 (8th Cir. 1964), cert. denied, 380 U.S. 980, 85 S.Ct. 1344, 14 L.Ed.2d 274 (1965), and by a woman standing in the position of the defendant's wife, *Nelson v. People of State of California*, 346 F.2d 73, 77 (9th Cir.), cert. denied 382 U.S. 964, 86 S.Ct. 452, 15 L.Ed.2d 367 (1965). The considerations most applicable to the third person's consent in such cases are not related to principles of agency connecting the defendant

with the person acquiescing in the search, but rather concern the reasonableness, under all the circumstances, of a search consented to by a person having immediate control and authority over the premises or property searched. (Cite omitted.) Miss Hilan lived in the apartment, and therefore had authority to consent to a search of it. . ."

In the dissent in *United States v. Robinson* (CA 7th Cir. 1973), 13 Cr L 2306, Chief Judge Swygert stated:

". . . I accept the rule of this circuit that 'where two persons have equal rights to the use or occupation of premises, either may give consent to a search,' *U.S. v. Sferas,* 210 F.2d 69, 74 (7th Cir.), cert. denied, 347 U.S. 935 (1954). As the very statement of the rule suggests, however, a question in every case such as this must be whether the third party who consents is in fact or in appearance a joint possessor.

* * * * *

"(W)hen the consenting party says nothing, as in *White,* a search is often upheld. No longer, however, may the Government rely on silence; Matlock effectively places upon the police the burden of determining whether a person encountered at the door has the authority to consent.

"Another contention of the Government, set forth in its brief, is that the conclusions of the trial court are contrary to the purpose of the exclusionary rule and opposed to the interests of law enforcement:

* * * * *

"This argument assumes too much. The police may search for and seize property of a suspect so long as they limit their entry to areas in which the consenting party has rights of joint tenancy and so long as the items seized have at a minimum some ostensible relevance to their investigation."

The New Mexico Court of Appeals in *State v. Johnson*, 13 Cr L 2490 (1973), held:

> "Padilla could consent to a search of his premises and this consent extends to portions of the premises that Padilla controlled jointly with other residents. However, * * * the issue is whether Padilla's consent, under the facts of this case, can validate the search of defendant's duffel bag. * * * There is no claim that the consenting party had any ownership or possessory interest in the effect seized. * * * There is no evidence that the bag was searched under the impression it was the property of someone other than the defendant. Nor is there evidence of any mistaken impression that the bag was jointly used, possessed or controlled by the consenting party and the defendant. Finally, there is no evidence of any authority (actual or mistaken) on the part of Mr. Padilla to consent to a search of defendant's personal effects."

The Government cites *People v. Gorg*, 45 Cal.2d 776, as being the only case they could find similar to the one at hand. In *Gorg*, the defendant was a student who rented a room from the consenting homeowner, and who, after the defendant's arrest called the defendant's father, cleaned the defendant's room for the defendant's father to stay in, found a bucket containing marijuana plants in the defendant's room, called police officers and gave them the bucket, and at a later date, along with the defendant's father, allowed the police to enter and search the defendant's room. The homeowner asked the police officers to search the whole house. The defendant brought a Motion to Suppress the evidence seized, but was unable to prove that the homeowner lacked the authority to authorize the search. The court in *Gorg* considered only the question of the actual authority of the homeowner to consent to the search.

In *Gurleski v. United States*, 405 F.2d 253, 261 (C.A. 5), cert. denied, 395 U.S. 981, cited by the Government, the court held:

> "We subscribed to the view that 'where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either.'
>
> * * * * *
>
> "It is clear that [the consentor] had an unrestricted right to operate the vehicle and had possession of the keys at all relevant times."

In *Gurleski*, the Court not only considered the apparent reasonableness of the consentor's permission to officers to search the defendant's car, but went on to make a factual determination of the actual authority of the consentor before deciding that the search was constitutional.

The Government also cites this Court's decision in *Schneckloth v. Bustamonte*, 36 L.Ed.2d 854, 875 (1973), as holding that the Fourth Amendment is not designed to discourage citizens in the aid of apprehension of criminals. *Schneckloth*, however, dealt only with the voluntariness of a consent to search and did not consider the question of the consentor's "authority" to consent to such search. There was no question but that the consentor had the authority to consent:

> "Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."

In the present case there is no question as to the voluntariness of Gayle Graff's consent to the search of Respondent's room and thus *Schneckloth* does not apply.

In the third case cited by the Government, *People v. Hopper*, 268 Cal. App. 2d 774, 779, the Court never reached the question of the "actual authority" of the consentor. It ruled that the consentor did not even have "apparent authority" to consent to a search of the defendant's home.

"The apparent authority" test is an additional or partial test of reasonableness of a search designed to insure observance of Fourth Amendment rights, rather than a sole criteria of reasonableness as the Government argues. This standard has been established simply because it would be ipsofacto unreasonable for police to pursue a search and seizure if it appeared to them that the person consenting to the search was not authorized to give such a consent. It was never intended that it should provide the sole justification for a search and seizure by police officers.

The District Court, while acknowledging that the statement by Mrs. Graff, the third party, to the police officers made it "reasonably apparent" to the officers that she and the Respondent jointly occupied the east bedroom of the Marshall home, further pointed out that the searching officers took no steps to inquire for themselves as to the status of the Respondent in the Marshall home; whether he occupied the east bedroom as a guest or a paying tenant; whether he and Mrs. Graff were married or whether he and Mrs. Graff had been living together regularly in the Marshall home or elsewhere. In fact, nothing was said to the officers on these subjects.

To accept the Government's "apparent authority" position would be to assume that "ignorance is bliss"

when it comes to a warrantless police search. The less the officer knows, and the less he takes the time to find out, and the less he actually finds out, the better off the search becomes, when scrutinized under the provisions of the Fourth Amendment. One can hardly propose such a standard in the name of furthering democracy.

In *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971), this Court stated:

"The State proposes three distinct theories to bring the facts of this case within one or another of the exceptions to the warrant requirement. In considering them, we must not lose sight of the Fourth Amendment's fundamental guarantee. Mr. Justice Bradley's admonition in his opinion for the Court almost a century ago in *Boyd v. United States*, 116 U.S. 616, 635, 20 L.Ed. 746, 752, 6 S.Ct. 524, is worth repeating here:

'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and least to gradual depreciation of the right, as if it consisted more in sound then in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

'Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment–subject only to a few specifically

established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative."

'(T)he burden is on those seeking the exemption to show the need for it.' "

It is a recognized exception to the warrant requirement of the Fourth Amendment that a search is reasonable if the searching officers are given consent to search by one actually authorized to give such consent. The Government would have this Court adopt an exception to that exception that is one step further away from the meaning and spirit of the Fourth Amendment, by now saying "a warrantless search is reasonable if consented to by one who may appear to have authority to consent, even if in fact he does not have authority to bind a third party to the results of his consent."

The Constitutional provisions and guarantees of the Bill of Rights were not intended to hamstring the operation of Government agents, as the Government hints, but were instead, "intended for the protection of the people. . ." *Weeks v. United States*, 232 U.S. 383 (1914). The exclusionary rule did not evolve to punish police, but rather its objective was "the security of one's privacy against arbitrary intrusion by the police." *Elkins v. United States*, 364 U.S. 206, 213 (1960). The Government points to no legitimate compelling reason to extend the aforementioned exception to the Fourth Amendment.

The Government argues that even if the Court finds that a consentor should have actual as well as apparent authority to bind a third person by his consent, there is no reason why the exclusionary rule should apply to any evidence found as a result of said search. The Govern-

ment argues that in the present case, the courts below specifically found that the police reasonably believed they had received a valid consent to search Matlock's room. The courts below also found that the searching officers took no steps to inquire for themselves as to the status of Matlock in the Marshall home and, as pointed out before, the "ignorance is bliss" position advocated by the Government is surely grounds to bring the exclusionary rule and its prohibition to officers and protection to citizens into play. Is it unreasonable to ask that police officers take the time to ask the questions that will enable them to make a determination as to the actual authority of the consentor to consent to a warrantless search? It should be remembered that the officers testified in the present case that they did not feel that they were in any eminent danger of harm. Is it not in line with the intent and spirit of the Fourth Amendment to warn police officers that if they do not take the time to inquire and find out whether or not the consentor has actual authority to consent to a warrantless search, that the fruits of their hasty action will be inadmissible at a trial? A POLICEMAN'S JOB IS ONLY EASY IN A POLICE STATE.

II.

THE COURTS BELOW APPLIED THE CORRECT STANDARD OF PROOF IN DETERMINING THAT THE GOVERNMENT HAD NOT SHOWN THAT MRS. GRAFF HAD ACTUAL AUTHORITY TO PERMIT THE SEARCH.

The Government correctly points out that the District Court appraised the sufficiency of the Government's evidence as to the actual authority of Mrs. Graff to consent to the search of Matlock's room by inquirying

whether it had been proved "to a reasonable certainty, by the *greater* weight of the credible evidence" (Pet. App. pp. 10A, 16A). We assume it was a printing error when the Court of Appeals held that the District Court had been correct in using the standard "to a reasonable certainty, by the *great* weight of the credible evidence." (Pet. App. pp. 6A - 7A).

The Government urges this Court to declare the lower courts in error and use the criteria of "proof by a proponderance of the evidence." It is Respondent's position that even though the Court of Appeals used the word "great" instead of the District Court's "greater," that these criteria are in fact little different from the criteria which the Government now urges this Court to accept.

Black's Law Dictionary, Fourth Edition, p. 1344, defines the word "preponderance" as follows:

> "Greater weight of evidence, or evidence which is more credible and convincing to the mind. *Button v. Metcalf*, 80 Wis. 193, 49 N.W. 809. That which best accords with reason and probability. *U.S. v. McCaskill*, D.C. Fla., 200 F.332. The word 'preponderance' means something more than 'weight'; it denotes a superiority of weight, or outweighing. The words are not synonomous, but substantially different. There is generally a 'weight' of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. *Mathes v. Aggler & Musser Seed Company*, 178 P. 713, 715, 179 Cal. 697; *Barnes v. Phillips*, 184 Ind. 415, III N.E. 419. See, also, *Weight of Evidence*."

Black defines "Weight of Evidence" on page 1765 as:

"The balance of preponderance of evidence; the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other."

The 'weight' or 'preponderance of proof' is a phrase constantly used, the meaning of which is well understood and easily defined. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. *Haskins v. Haskins*, 9 Gray, Mass., 393.

* * * * *

'Weight of Proof' means greater amount of credible evidence and is synonomous with 'preponderance of proof.' *Haskins v. Haskins*, (9 Gray), supra.

McCormick in his 'Handbook of the law of Evidence,' discusses 'burden of proof and presumption' on page 676, 677, and 686, and states the following:

"What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? A widely accepted definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence. This is a simple common-sense explanation which will be understood by jurors and could hardly be misleading in the ordinary case.

* * * * *

". . ., it is submitted that a misdirection as to the burden of persuasion should be assumed by the upper court not to have influenced the verdict unless special reasons appear in the particular case to believe that it did."

Should this Court refuse to accept the position that there is little actual difference between the standard used by the District Court and that proposed by the Government, Respondent submits that the standard set by the District Court was applied, not to the voluntariness of the consent given by Mrs. Graff, but rather to the factual basis underlying Gayle Graff's authority to bind the Respondent with her consent. Where there is a question concerning privileges so fundamental to our system of constitutional law, those privileges cannot be eroded by low standards of proof:

> "This court has always set the high standard of proof for the waiver of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458, 82 L Ed 1461 (1939)..." See also *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), and *United States v. Coleman*, 322 F. Supp. 550, 553.

The Government cites *Lego v. Twomey*, 404 U.S. 477, arguing that the standard of proof set forth in that case governing the voluntariness of a confession is the same standard of proof to which the Government should be held in showing that a consentor had actual authority to consent to a search and bind a defendant to the results of that search. In *Lego* this Court held:

> "... the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." 404 U.S. 477, 489.

The question considered by the District Court and the Court of Appeals in this case was different than the question considered in *Lego*, i.e., "The authority of a consentor to bind a defendant to the results of the consentor's action." The decision and standard in *Lego* went specifically to the "voluntariness of the confession." It should be pointed out that the District Court in

Matlock did not hold that the Government had to prove actual authority by "evidence beyond a reasonable doubt," but rather by a standard requiring a lower degree of proof, i.e., "to a reasonable certainty, by the greater weight of the credible evidence."

Respondent submits that where the standards used, such as "fair and positive evidence," or "clear and convincing," or "to a reasonable certainty," or "to a reasonable certainty by the greater weight of the credible evidence," are so inherently subjective, and the Government fails to distinguish the test which it advocates specifically from the test from which it is appealing, and further when the Government fails to show that such semantic subtleties are in any way prejudicial to its position, this Court should not reverse a decision of a lower Appellate Court.

III

THE COURT OF APPEALS DID NOT ERR IN HOLDING INADMISSIBLE THE OUT OF COURT STATEMENTS MADE BY MRS. GRAFF AND RESPONDENT INDICATING THE JOINT OCCUPANCY OF RESPONDENT'S ROOM.

The Government agrees that statements by Respondent and Mrs. Graff, excluded by the District Court as hearsay, were in fact hearsay. The Government, however, argues that there is no reason to exclude hearsay evidence, or as the Government prefers to call it, "reliable hearsay" evidence, from consideration when there is no jury present at a hearing or trial. This Court, in *Bridges v. Wixon*, 326 U.S. 135, 153 (1945), stated:

"The statements which O'Neil allegedly made were hearsay. We may assume that they would be admissible for purposes of impeachment. But they

certainly would not be admissible in any criminal case as substantive evidence. *Hickory v. United States*, 151 U.S. 303, 309, 38 L. Ed 170, 174, 14 S. Ct. 334; *United States v. Block*, (CCA2d) 88 F.2d 618, 620. So to hold would allow men to be convicted on unsworn testimony of witnesses–a practice which runs counter to the notions of fairness on which our legal system is founded."

The sound reasons for excluding hearsay evidence apply without reference to the character of the proceeding or the nature of the court before which the evidence is offered: (1) The declarant who made the hearsay statement commonly speaks without the solemnity of the oath administered to witnesses in a court of law, (2) There is no opportunity, in respect to the out of court declarant, to observe of his demeanor, and (3) The danger in a case of an oral reporting of an out-of-court statement is that the witness reporting the statement may do so inaccurately.

McCormick defines "hearsay" as

"Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." *McCormick, Evidence*, Section 225, Page-460 (1964).

"As a rule, hearsay is inadmissible without reference to the character of the proceeding or the nature of the court before which it is offered. The fact that a court of domestic relations may inform itself by hearsay evidence when acting as a disinterested advisor or conciliator does not permit it to receive

such evidence when exercising a strictly judicial function, such as determining a motion in a divorce suit for the allowance of temporary alimony. The use of hearsay evidence at a trial or hearing on a complaint alleging juvenile delinquency has been held improper in juvenile court proceedings, it being said that hearsay has no more place in a juvenile court than in any other court." 29 Am. Jur.2d, Evidence, Section 495.

It is interesting that the Government states in its brief that as "reliable hearsay" the aforementioned statements of the Respondent and Graff are admissible. The Government cites no authority for the distinction it proposes between pure hearsay and reliable hearsay. If the Government wishes this Court to assume that "reliable hearsay" is a close "cousin" to what we might call "truthful hearsay," this position can be refuted by the fact that some of the statements which the Government wishes to have admitted into evidence were statements made by both Respondent and Graff that they were married. (Pet. App. pp. 7A) The undisputed fact was that Respondent and Graff were never married.

The Government cites *Chambers v. Mississippi*, 410 U.S. 284, (1973), as supporting its position. However, in *Chambers*, this Court reversed a decision which excluded certain defense hearsay evidence because that hearsay evidence fell within a recognized exemption to the hearsay rule.

As its final argument the Government cites Rule 104 (a) of the proposed New Federal Rules of Evidence which holds, in its relevant parts, that preliminary questions concerning the admissibility of evidence shall be determined by the Judge, who is not bound by the rules of evidence except those with respect to privileges. The New Federal Rules of Evidence should not be applied retro-

spectively. The District Court was not bound by Rule 104 (a) at the time it entered its decision.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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